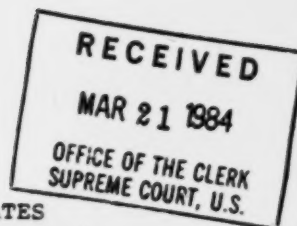


**ORIGINAL**

**83-6459**

No.A-719



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHNNY LUKE,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Alabama.

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March 20, 1984

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Petitioner,

vs.

STATE OF ALABAMA,

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PETITION FOR WRIT OF CERTIORARI  
To the Supreme Court of Alabama.

To the Honorable, the Chief Justice and Associate Justices of the  
Supreme Court of the United States.

Johnny Luke, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in the above-entitled case on September 30, 1983 with rehearing denied on December 22, 1983.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is unreported and is attached in Appendix A hereto. The opinion of the Supreme Court of Alabama is unreported and is attached in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on September 30, 1983, a timely petition for rehearing was denied on December 22, 1983, the jurisdiction of this Court is invoked under 28 USC 1257, and Article III of the United States Constitution.

QUESTIONS PRESENTED

1. a. WHETHER THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY SUFFICIENT TO PROVE ROBBERY IN THE FIRST DEGREE OR AN ATTEMPT THEREOF, THUS BRINGING THE DEFENDANT WITHIN THE AMBIT OF §13A-5-40(a)2, Code of Alabama, 1975?
- b. WHETHER THE DEATH PENALTY IS APPROPRIATE IN THIS CASE, WHERE THE ONLY AGGRAVATING CIRCUMSTANCE INVOLVED IS THE COMMISSION OF AN ATTEMPT TO ROB, AND THE ONLY EVIDENCE OF SUCH AN ATTEMPT WAS THROUGH CONFLICTING STATEMENTS?
- c. WHETHER THE IMPOSITION OF THE DEATH PENALTY DENIED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE 5th, 8th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION?
2. WHETHER IN LIGHT OF THE LACK OF PROOF OF THE AGGRAVATING CIRCUMSTANCE AND UNDERLYING CHARGE OF ROBBERY, OR ATTEMPTED ROBBERY, IN THE FIRST DEGREE, THE MITIGATING CIRCUMSTANCE MANDATED A LESSER SENTENCE THAN DEATH?

STATUTES INVOLVED

1. UNITED STATES CONSTITUTION:

a. 5th Amendment,

"No person shall be . . . deprived of life liberty or property, without due process of law . . ."

b. 8th Amendment,

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

c. 14th Amendment.

"[n]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. CODE OF ALABAMA, 1975.

a. §13A-5-40(a)(2),

"(a) The following are capital offenses:

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;"

b. §13A-4-2(d)(2),

"(d) An attempt is a:

(2) Class B felony if the offense attempted is a Class A felony."

c. §13A-6-2(a)(3),

"(a) A person commits the crime of murder if:

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person."

#### STATEMENT OF THE CASE

The Petitioner was indicted on August 25, 1982, by the Grand Jury of Russell County, Alabama, on the charge of Murder during a Robbery in the First Degree (R. 429 & 430). On September 8, 1982, the Petitioner was arraigned and pleaded not guilty (R. 434). On September 13, 1982, the Petitioner filed a petition for psychiatric examination (R. 439-441); after hearing, said petition was denied (R. 444).

Trial by jury commenced on September 29, 1982; on September 30, 1982, after hearing the evidence, the jury found the Petitioner guilty as charged in the indictment (R. 462). The Petitioner waived the participation of the jury in the sentencing phase of the trial (R. 401). On October 1, 1982, a sentencing hearing was held (R. 404-416). After a presentence report was considered by the trial court (R. 417-420), the Petitioner was sentenced to death on October 29, 1982 (R. 425). The case was automatically appealed to the Alabama Court of Criminal Appeals.

On March 1, 1983, the conviction and sentence of the Petitioner were affirmed by the Alabama Court of Criminal Appeals. An application for rehearing was filed on March 14, 1983, and denied on March 29, 1983. Petition for certiorari was automatically granted on April 29, 1983.

The Supreme Court of Alabama affirmed the findings of the Alabama Court of Criminal Appeals on September 30, 1983. Rehearing was denied on December 22, 1983.

### STATEMENT OF THE FACTS

On July 23, 1982, at approximately 8:30 o'clock A.M., the Petitioner and his companion George Warren loaded some watermelons in rural Russell County, Alabama (R-82). Later that same day, at approximately 1:30 o'clock P.M., the two traveled to the store of James T. Hughes, in Hurtsboro, Russell County, Alabama. They both entered the store and Warren bought and paid for some beer. While they were there alone with Mr. Hughes, he was fatally shot four (4) times with a .38 caliber revolver (R-100).

No money or merchandise was stolen from the victim or his store by either the Petitioner or his companion (R-272). The two left the premises in Warren's pick-up truck, and after switching vehicles with Warren's girl friend, they were arrested by Deputies of the Russell County Sheriff's Department (R-130) in connection with the shooting (R-129).

According to the testimony of the State Witnesses, there was nothing missing from the store, (R-44) and the merchandise did not appear to have been disturbed (R-52). No property found with the Petitioner could be shown to have been removed from the Hughes store (R-148 and R-233). Petitioner made several statements to the law enforcement officers prior to trial, including a statement that he did not intend to rob the victim (R-257) and that he did not take anything (R-256). In a taped statement, investigators did not ask the petitioner about motive, and the statement contained no facts pertaining to theft (R-188-194).



REASONS FOR GRANTING THE WRIT

THE STATE FAILED TO PROVE AN ATTEMPT TO ROB BY EITHER CIRCUMSTANTIAL OR DIRECT EVIDENCE, AND SUCH PROOF WAS ESSENTIAL IN THIS CAUSE IN ORDER TO IMPOSE THE DEATH PENALTY.

The imposition of the death penalty in this case is based on one aggravating circumstance - that "the capital offense was committed while the defendant was engaged in an attempt to commit robbery". The essential elements of Robbery are: 1) Felonious intent; 2) Force or putting in fear as the means of effecting the intent; and, 3) By that means the taking and carrying away of the personal property of another from his person or in his presence, with all three elements occurring in point of time. Davis v. State, 401 So.2d 187 (Ala. Crim. App.), Cert. denied, 401 So.2d 190 (Ala. 1981). The commentary to the robbery statute points out that violence used or threatened must be for the purpose of accomplishing a theft. Code Commentary, §13A-8-40 through §13A-8-44, Code of Alabama, 1975. Though attempt is alleged in this case, there is no evidence to show such an attempt. The statements of the defendant were conflicting and the State showed nothing other than these conflicting statements as proof of an attempt to rob. Additionally, it was shown that the defendant was frightened of the law enforcement officers and that the circumstances surrounding his first statement were unusually intimidating.

Petitioner submits that the finding by the jury of an underlying robbery, or attempt to rob, was based merely on speculation, conjecture and surmise, which did not reach the level of

circumstantial evidence. Lacey v. State, 354 So.2d 342 (Ala. Crim. App. 1978) There was no direct evidence of robbery or attempt to rob. Thus the aggravating circumstance was not proven and the death penalty was inappropriately applied.

Petitioner submits that by failure of proof beyond a reasonable doubt, he has been deprived of his liberty and will be deprived of his life without due process of law and in derogation of the 5th and 14th Amendments to the United States Constitution. Additionally, one should note that in the statutory scheme of the Alabama Criminal Code, an attempted robbery constitutes a Class B felony punishable by a sentence of not less than 2 nor more than 20 years.

§13A-4-2(d)(2), Code of Alabama, 1975. Murder committed during any degree of robbery is a Class A felony carrying a penalty of life or not more than 99 years or less than 10 years. §13A-6-2(a)(3), Code of Alabama, 1975. Since the aggravating circumstance was found to be an attempt to rob for which the defendant could have received a maximum of 20 years, the death penalty as applied is cruel and unusual punishment prohibited by the 8th and 14th Amendments to the United States Constitution.

Additionally petitioner submits that the "double standard" involved in the Alabama statutory scheme denied him equal protection of the law in that all persons in his classification (a person accused of murder during robbery) would not be treated equally. Since the murder statute encompasses all degrees of murder and the capital murder statute only encompasses those accused of murder during first degree robbery or the attempt thereof, some defendants accused of murder during first degree robbery, or attempt thereof,

could be prosecuted under the capital statute and some under the non-capital statute. There is no protection included within the Alabama Criminal Code to control arbitrary application of the capital and non-capital "robbery - murders". Thus, the petitioner was denied equal protection of the law under the 14th Amendment.

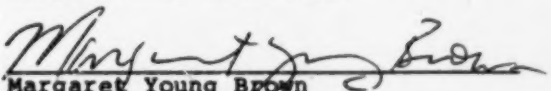
IN VIEW OF THE LACK OF PROOF AS TO THE AGGRAVATING FACTOR, THE FINDINGS BY THE COURT OF THE STATUTORY MITIGATING FACTOR MANDATES REVERSAL OF THE DEATH PENALTY IMPOSED.


The trial court found that the defendant had no significant history of prior criminal activity, a statutory mitigating circumstance, §13A-5-51(1), Code of Alabama, 1975. As set out herein petitioner contends that the finding of the aggravating circumstances was not supported by the evidence. Because of this lack of proof, petitioner submits that the mitigating circumstance outweighs the aggravating one, and thus, the sentence of death is improper.

#### CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

  
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SEP 1983

FILED  
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SUPREME COURT

83-6459

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT  
THE SUPREME COURT OF ALABAMA  
SPECIAL TERM, 1983

Ex parte: Johnny Luke

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CRIMINAL APPEALS

(Re: Johnny Luke

82-622

v.

State of Alabama)

Appeal from Russell Circuit Court

ADAMS, JUSTICE.

Johnny Luke, petitioner, was convicted of the capital offense of "murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant." Code 1975, § 13A-5-40(a)(2). In a separate sentencing phase of the trial, the trial judge sentenced petitioner to death by electrocution. We granted the petition for a writ of certiorari, which petitioner is entitled to as a matter of right, in order to review the decision of the Court of Criminal Appeals affirming petitioner's conviction and sentence of death.

Pursuant to Code 1975, § 13A-5-47(d), the trial court made written findings of facts summarizing the crime and petitioner's participation in it. The Court of Criminal Appeals, in addition to outlining the proceedings in the trial court, incorporated those written findings in its opinion, \_\_\_ So. 2d \_\_\_. They need not be restated here.

Petitioner raises several issues in his brief. We first consider petitioner's argument that the State did not satisfy its burden of proof as to the robbery component of the capital offense of which he was convicted.

Petitioner asserts that the State's inability to produce direct evidence of a plan to commit robbery, or of an attempt to take or carry away the personal property of the deceased, at the time of the shooting, constitutes a failure of proof by the State. Having carefully considered the opinion of the Court of Criminal Appeals, which we think correctly addressed this issue, we conclude that petitioner's argument is unfounded.

As the appellate court likewise indicated:

... it must be considered as settled that inconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admissions or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction although such facts and circumstances, standing alone, would not thus satisfy the jury of the existence of the corpus delicti.

Hill v. State, 207 Ala. 444, 446, 93 So. 460, 462 (1922); Bridges v. State, 284 Ala. 412, 418, 225 So. 2d 821, 826 (1969). Here, petitioner's statements regarding his intent to rob, albeit conflicting, should be considered with those facts and circumstances that are undisputed, though inconclusive.

The facts are undisputed that petitioner and his companion, one of whom was carrying a pistol, entered a small general merchandise store. While they were in the store, alone with the proprietor, the petitioner's companion brought some beer

to the check-out counter to be rung up and sacked. Thereafter, the proprietor was fatally shot near the cash register, and petitioner and his companion left the store. Though these facts cannot be regarded as conclusive, they have "a just tendency to lead the mind to the conclusion that the offense has been committed," and would be admissible to corroborate the statements of petitioner. Matthews v. State, 55 Ala. 187, 194 (1876), cited in Hill v. State, 207 Ala. at 446, 93 So. at 462. They are unquestionably typical of the now too frequent convenience store robbery. Therefore, we agree with the conclusion of the Court of Criminal Appeals that the verdict of the jury and the written findings of fact of the trial judge were supported by the evidence.

Petitioner also argues that the sentence of death was imposed under the undue influences of passion and prejudice, that the sole aggravating circumstance found by the trial court was not supported by the evidence, and that the death penalty is unconstitutional. We think these issues were properly addressed by the Court of Criminal Appeals, and, therefore, need no further comment by us.

As required by Rule 39(k), A.R.A.P., we have searched the record of both the trial phase and the sentencing phase of petitioner's trial for any plain error or defect which "has or probably has adversely affected the substantive rights of the petitioner." We have found no such error. Moreover, having independently weighed the aggravating and mitigating circumstances in this case, we conclude that the trial court's sentence of death was correct under the circumstances of this

case, and not excessive or disproportionate to the penalty imposed in other robbery-intentional killing cases.

For the foregoing reasons, we affirm the decision of the Court of Criminal Appeals.

AFFIRMED.

Torbert, C. J., Maddox, Faulkner, Jones, Almon, Shores, and Beatty, JJ., concur.

1 MAR 1983

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

4 Div. 98

Johnny Luke

v.

State of Alabama

Appeal from Russell Circuit Court

TYSON, JUDGE

Johnny Luke was indicted for and convicted of the capital murder of James T. Hughes, the proprietor of a general store in Hurtsboro, Alabama, during a robbery in the first degree, or an attempt thereof, in violation of



§ 13A-5-40(a)(2), Code of Alabama 1975.

Pursuant to § 13A-5-44, the appellant, with the consent of the State and with the approval of the trial court, waived the participation of a jury in the sentencing phase of the trial. We have examined the record setting out appellant's waiver of jury participation and we find that appellant was expressly informed of his right to have the jury involved in the sentence proceeding and that the appellant freely and intelligently gave up that right.

Thereafter, the trial court ordered a pre-sentence investigation report as specified in § 13A-5-47(b) and, with the consent of both parties, delayed the sentence hearing pending receipt of the report. Alabama Code § 13A-5-45(a) (1975). Subsequently, the trial court weighed the aggravating and mitigating circumstances according to § 13A-5-47, and sentenced appellant to death. The court entered specific written findings regarding the existence or non-existence of each aggravating circumstance listed in § 13A-5-49, and each mitigating circumstance enumerated in § 13A-5-51 or referred to in § 13A-5-32.<sup>1/</sup>

According to the mandate of § 13A-5-47(d), the trial court made the following findings of fact summarizing the crime and the appellant's participation in this offense, which we hereby adopt: (R. 477-480).

"At approximately 7:00 A.M., Central Daylight Time, on Friday, July 23, 1982, defendant was awakened by George Warren. Warren wanted defendant to help him load watermelons onto his El Camino pickup truck. They went to the house of Alice Starke, Warren's girlfriend, and loaded watermelons until 8:30 A.M. They then went to the house of Lucile Goode and they left several watermelons. Thereafter they went to the trailer of Warren in rural Russell County. At approximately 12:30 P.M. on that same day, Warren and defendant decided to rob the store of James T. Hughes in Hurtsboro,

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<sup>1/</sup> The trial court's findings of fact and sentence are incorporated herein as Appendix A. (R. 477-483).

Russell County, Alabama. They traveled to the store in Warren's pickup and arrived there at approximately 1:30 P.M. Warren went inside first and purchased two cans of beer. By that time defendant had entered the store armed with a five-shot .38 caliber revolver. This weapon belonged to Warren and had been in defendant's possession for approximately a week. James T. Hughes was behind the counter upon which a cash register was placed. After Hughes made change for Warren's purchase, defendant fired the pistol four times. All four bullets struck Mr. Hughes. He was struck in the face, the upper left arm, the right forearm, and the upper right chest. This last bullet traveled through his body, severing the vena cava to the heart and caused substantial damage to the liver. After being discovered, he was transferred to Cobb Memorial Hospital in Phenix City, Alabama, where he died in surgery. Two bullets were recovered from the body of Mr. Hughes. These bullets were fired from the pistol which was later found in the trailer of George Warren. The death of Mr. Hughes was caused by a gunshot wound to his chest. Mr. Hughes was first discovered by Jimmy Lee Berry, who summoned aid. Mr. John T. Smith was one of the persons giving assistance to Mr. Hughes. Mr. Hughes said several times, 'John T., I'm not going to make it.' Hurtsboro Police Chief Richard Roynon asked Mr. Hughes who shot him. Mr. Hughes responded by saying, 'That Luke boy and George Warren was with him.'

"After the shooting Warren and defendant left the premises. Warren drove the pickup truck to his residence. While enroute defendant removed four spent shells and threw them out the window. Warren went inside his trailer with the pistol and left it there. This pistol was later recovered pursuant to a valid search warrant.

"From Warren's trailer they drove to the house of Alice Starke and borrowed her car. The pickup truck was left in the yard. The defendant and George Warren went to the grocery store of Frank Hendricks in Hurtsboro, Alabama, where Warren bought several items. On the way back to Warren's residence they were apprehended by deputies of the Russell County Sheriff's Department. At that time defendant made a voluntary statement, after waiving his rights under the constitutions of the United States and Alabama. Defendant told Deputy Sheriff B.J. Ammons that Warren and he had decided that morning to go to the store of Mr. Hughes and rob him. He said they went to the store and Hughes 'gave them trouble.' Defendant said he shot Hughes four times. Later that evening, at 5:00 P.M., at the Hurtsboro police department, the defendant said in a voluntary statement, after waiving his constitutional rights, that he and Warren went to Hughes' store. Defendant shot Hughes four times. Defendant also stated that he did not intend to rob Mr. Hughes. At 11:04 P.M. that same night, defendant made another voluntary

statement, after waiving his constitutional rights. Defendant said he and Warren decided about 12:30 P.M. to rob Mr. Hughes' store because Hughes 'had money there.' Defendant said that after Warren purchased some beer he (defendant) started shooting. Defendant said he was going to get money after he shot Hughes but that he didn't because he 'changed his mind.'

"On July 25, 1982, in another voluntary statement after waiving his constitutional rights, defendant said he shot Mr. Hughes. This statement was tape-recorded. Investigator Thomas Boswell testified at trial that after the voluntary waiver of constitutional rights and before the statement was recorded, defendant was asked if robbery was the motive. Investigator Boswell testified that defendant responded in the affirmative.

"James T. Hughes was not armed with any weapon. There is no evidence to indicate that the killing of James T. Hughes by defendant was a justifiable or excusable homicide. The Court finds that defendant went to the store of James T. Hughes to rob him. There defendant intentionally shot and murdered James T. Hughes during an attempt to rob the said James T. Hughes."

# I

The appellant insists that, because there was no direct evidence of a theft of property from the victim, the State failed to prove that the murder was committed during a robbery or an attempted robbery.

The appellant's argument focuses on the third element of common-law robbery, "taking and carrying away of the personal property of another," see Davis v. State, 401 So.2d 187, 189 (Ala.Crim.App.), cert. denied, 401 So.2d 190 (Ala. 1981), concluding that without evidence of "taking," the appellant cannot be guilty of the crime charged.

This argument overlooks the fact that the present Alabama robbery statutes are broader than common-law robbery and embrace acts which, under former law, would have amounted to attempted robbery or to assault with intent to rob. Alabama Code §§ 13A-8-40 through -44 (1975) (Commentary); Marvin v. State, 407 So.2d 576 (Ala.Crim.App. 1981). Furthermore, the capital offense is "murder by the defendant during a robbery

in the first degree or an attempt thereof committed by the defendant." Alabama Code § 13A-5-40(a)(2) (1975). Emphasis added.

Therefore, in our judgment, the jury was warranted in finding that appellant shot Hughes "in the course of committing a theft" as the indictment herein charged and as the robbery statutes of this state prohibit.

" 'IN THE COURSE OF COMMITTING A THEFT' embraces acts which occur in an attempt to commit or the commission of theft, or in immediate flight after the attempt or commission."

Alabama Code §§13A-8-40(b) (1975). "Attempt" is defined in § 13A-4-2(a), Code of Alabama 1975, as follows.

"A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense."

The appellant's intent to rob is indicated by his own statements. As this court observed in Watters v. State, 369 So.2d 1262, 1271-72 (Ala.Crim.App. 1978), reversed on other grounds, 369 So.2d 1272 (Ala. 1979):

"[I]nconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admissions or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction, although such facts and circumstances, standing alone, would not thus satisfy the jury of the existence of the corpus delicti."

Although appellant also made other statements denying his intent to rob, we must view the evidence in the light most favorable to the State, Cumbo v. State, 368 So.2d 871, 874 (Ala.Crim.App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979), to determine "whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt," Dolvin v. State, 391 So.2d 133, 137 (Ala. 1980).

Thus, not only was the jury warranted in finding appellant's intent to rob from his own statements, but

from the facts, they were also authorized to conclude that appellant's entering the store, drawing the pistol, and shooting Hughes were overt acts toward the commission of a robbery. The verdict of the jury and the written findings of fact by the trial judge that the capital offense occurred during an attempted robbery were amply supported by the evidence in this cause.

## II

The appellant asserts that the jury was unduly affected by the weeping of the victim's widow during the trial, thereby causing the sentence of death to be "imposed under the influence of passion and prejudice," in violation of § 13A-5-53(b)(1).

The record does not indicate that the jurors were distracted, disturbed or influenced in any manner by the presence of Mrs. Hughes. Further, the record reveals that prior to appellant's objection concerning the widow's display of emotion, the trial court cautioned the jury "not to permit any sympathy, any prejudice, or any emotion for or against anyone to influence you." (R. 31).

More importantly, any influence on the jury could not have tainted the determination of appellant's sentence, since the jury was not involved in the sentencing phase of this trial. Following the appellant's waiver of jury participation, the trial judge alone determined all matters relating to this appellant's sentence.

## III

It is hereby noted that the death penalty is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. Gregg v. Georgia, 428 U.S. 153, 168-88, 226 (1976); Beck v. State, 396 So.2d 645, 655 (Ala. 1980).

## IV

Under § 13A-5-53, Code of Alabama, this court is required, in addition to examining the record for errors



affecting appellant's conviction, to review the propriety of the death sentence.

In accord with our statutory mandate, we have reviewed the sentencing phase of the trial and have found no error adversely affecting the appellant's rights. The trial court's findings concerning the aggravating and mitigating circumstances are fully supported by the evidence and, in our judgment, the sentence of death is proper in this case.

As shown by Appendix A, the trial court found one aggravating circumstance to exist and one mitigating circumstance to be present. The existence of the aggravating circumstance outline in § 13A-5-49(4) (The capital offense was committed while the defendant was engaged in an attempt to commit robbery) is fully borne out by the evidence presented. The presence of the mitigating circumstance set out in § 13A-5-51(1) (The defendant has no significant history of prior criminal activity) is also supported by the evidence. Further, the record reveals the trial court's assessment to be correct, that no aggravating or mitigating circumstances, other than those specifically found to be present, existed.

We have also determined, in accord with § 13A-5-53(b) and (c) that

(1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) that our independent weighing of the aggravating and mitigating circumstances at the appellate level reveals the death penalty is the proper sentence under the evidence; and

(3) that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and this defendant-appellant. See Beck v. State, 396 So.2d 645, 654 n. 5 (1980) (the great majority of death sentences in Alabama are for robbery-murder).

In addition to addressing all of the questions raised by this appellant on this appeal, we have carefully searched

the entire record for plain error, A.R.A.P. 45 A, and have found none adversely affecting appellant's substantial rights. The judgment of conviction and sentence of death is due to be and is hereby affirmed.

AFFIRMED.

All the Judges concur.





beer. By that time defendant had entered the store armed with a five-shot .38 caliber revolver. This weapon belonged to Warren and had been in defendant's possession for approximately a week. James T. Hughes was behind the counter upon which a cash register was placed. After Hughes made change for Warren's purchase, defendant fired the pistol four times. All four bullets struck Mr. Hughes. He was struck in the face, the upper left arm, the right forearm, and the upper right chest. This last bullet traveled through his body, severing the vena cava to the heart and caused substantial damage to the liver. After being discovered, he was transported to Cobb Memorial Hospital in Phenix City, Alabama, where he died in surgery. Two bullets were recovered from the body of Mr. Hughes. These bullets were fired from the pistol which was later found in the trailer of George Warren. The death of Mr. Hughes was caused by a gunshot wound to his chest. Mr. Hughes was first discovered by Jimmy Lee Berry, who summoned aid. Mr. John T. Smith was one of the persons giving assistance to Mr. Hughes. Mr. Hughes said several times, "John T., I'm not going to make it." Hurtsboro Police Chief Richard Roynon asked Mr. Hughes who shot him. Mr. Hughes responded by saying, "That Luke boy and George Warren was with him."

After the shooting Warren and defendant left the premises. Warren drove the pickup truck to his residence. While enroute defendant removed four spent shells and threw them out the window.

Warren went inside his trailer with the pistol and left it there. This pistol was later recovered pursuant to a valid search warrant.

From Warren's trailer they drove to the house of Alice Starke and borrowed her car. The pickup truck was left in the yard. The defendant and George Warren went to the grocery store of Frank Hendricks in Hurtsboro, Alabama, where Warren bought several items. On the way back to Warren's residence they were apprehended by deputies of the Russell County Sheriff's Department. At that time defendant made a voluntary statement, after waiving his rights under the constitutions of the United States and Alabama. Defendant told Deputy Sheriff B. J. Ammons that Warren and he had decided that morning to go to the store of Mr. Hughes and rob him. He said they went to the store and Hughes "gave them trouble." Defendant said he shot Hughes four times. Later that evening, at 5:00 P. M., at the Hurtsboro police department, the defendant said in a voluntary statement, after waiving his constitutional rights, that he and Warren went to Hughes' store. Defendant shot Hughes four times. Defendant also stated that he did not intend to rob Mr. Hughes. At 11:04 P. M. that same night, defendant made another voluntary statement, after waiving his constitutional rights. Defendant said he and Warren decided about 12:30 P. M. to rob Mr. Hughes' store because Hughes "had money there." Defendant said that after Warren purchased some beer he (defendant) started shooting. Defendant said he was going to get money after he shot Hughes but that he didn't because he "changed his mind."

On July 25, 1982, in another voluntary statement after waiving his constitutional rights, defendant said he shot Mr. Hughes. This statement was tape-recorded. Investigator Thomas Boswell testified at trial that after the voluntary waiver of constitutional rights and before the statement was recorded, defendant was asked if robbery was the motive. Investigator Boswell testified that defendant responded in the affirmative.

James T. Hughes was not armed with any weapon. There is no evidence to indicate that the killing of James T. Hughes by defendant was a justifiable or excusable homicide. The Court finds that defendant went to the store of James T. Hughes to rob him. There defendant intentionally shot and murdered James T. Hughes during an attempt to rob the said James T. Hughes.

After the trial both the State of Alabama and the defendant waived the participation of a jury in the sentence hearing. The Court finds that the defendant was expressly informed of his right to have the jury participate in the sentence hearing. The Court further finds that the defendant fully, voluntarily, knowingly, and intelligently waived his right to the participation of a jury in this sentence hearing.

Subsequently the Court held a sentence hearing without the participation of a jury. At the sentence hearing the State rested on the evidence adduced at trial. At this hearing the defendant took the stand and testified that he did not intend to

rob Mr. Hughes or take anything out of the store. He further testified that he was sorry about what happened at the store. He further expressed his desire to live. The Court then received arguments from the counsel for both parties.

The Court also ordered the probation officer for this circuit to prepare a written presentence investigation report. This report was duly prepared and filed with the Court. Copies of the same were furnished to counsel for both parties. A hearing was held for the parties to respond to the report and to present evidence about any part of the report which would be the subject of a factual dispute. At this hearing the State presented no further evidence. The defendant, through his counsel, rested upon the matters brought forth at the sentence hearing.

The Court finds from the evidence presented in this case that the defendant was guilty and is guilty of the murder of James T. Hughes while committing a robbery in the first degree.

#### FINDINGS FROM THE SENTENCE PHASE

The Court finds the following aggravating circumstance to exist in this case:

The capital offense was committed while the defendant was engaged in the commission of an attempt to commit robbery.

The Court finds that the following aggravating circumstances do not exist in this case:

- a. the capital offense was committed by a person under

sentence of imprisonment.

b. the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

c. the defendant knowingly created a great risk of death to many persons.

d. the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

e. the capital offense was committed for pecuniary gain.

f. the capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

g. the capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Upon consideration of all the evidence brought forth at the trial in this case, the sentence hearing, and the presentence investigation report, the Court finds that the following mitigating circumstance exists in this case:

The defendant has no significant history of prior criminal activity.

The Court finds that the following mitigating circumstances do not exist in this case:

a. the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

b. the victim was a participant in the defendant's conduct or consented to it.

c. the defendant was an accomplice in the felony offense committed by another person and his participation was relatively minor.

d. the defendant acted under extreme duress or under the substantial domination of another person.

e. the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

f. the age of the defendant at the time of the crime.

g. any other circumstances offered pursuant to Section 13A-5-52.

Upon considering and weighing the aggravating circumstance with the mitigating circumstances in this case, the Court is of the opinion that the aggravating circumstance outweighs any mitigating circumstances. It is, therefore,

ORDERED AND ADJUDGED BY THE COURT that the defendant be sentenced to death by electrocution as specified in the laws of this state and as set forth in an order of sentence by this Court.   
 the 29th day of October, 1982.

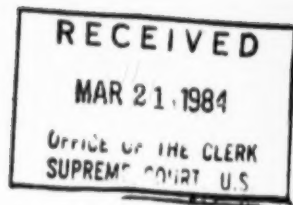
FILED IN OFFICE

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CIRCUIT COURT  
RUSSELL CO. ALA.

Wayne J. Johnson  
Circuit Judge

83-6459



AFFIDAVIT IN SUPPORT OF REQUEST  
TO PROCEED IN FORMA PAUPERIS

Johnny LUXE  
Plaintiff(s)

vs.

STATE OF ALABAMA  
Defendant(s)

I, Johnny LUXE, being first duly sworn, depose and say that I am the plaintiff in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? YES ( ) NO (✓)

A. If the answer is YES, state the amount of your salary or wages per month, and give the name and address of your employer.

ALABAMA STATE DEPARTMENT Located in  
Seale ALABAMA RUSSELL COUNTY

B. If the answer is NO, state the date of last employment and the amount of salary and wages per month which you received.

JULY 22 1982 MONTHLY ~~508.81~~ 508.81  
FIVE hundred & eight DOLLARS 81¢

2. Have you received within the past twelve months any money from any of the following sources?

A. Business, profession or form of self-employment? YES ( ) NO (✓)

B. Rent payments, interest or dividends? YES ( ) NO (✓)

C. Pensions, annuities or life insurance payments? YES ( ) NO (✓)

D. Gifts or inheritances? YES (✓) NO ( )

E. Any other sources? YES ( ) NO (✓)

If the answer to any of the above is YES, describe each source of money and state the amount received from each during the past twelve months.

I Received gifts From my people and Friends.  
Money. I don't know the exact in the past year



3. Do you own cash, or do you have money in a checking or savings account? [Include any funds in prison accounts.] YES ( ) NO ( )

If the answer is YES, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property [excluding ordinary household furnishings and clothing]? YES ( ) NO (✓)

If the answer is YES, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons and indicate how much you contribute toward their support. NONE

Johnny LUKE  
Signature of Affiant

STATE OF ALABAMA )  
COUNTY OF ECAM. )

Before me, a notary public in and for said County, in said State, personally appeared Johnny LUKE, whose name is signed to the foregoing complaint, who being first duly sworn, deposes on oath and says:

That the information set forth in the foregoing affidavit is true and correct to the best of his knowledge and belief.

Johnny LUKE  
Signature of Affiant

Sworn to and subscribed before me this 6th day of Mar, 1981

Eddie Dardier  
Notary Public

3-25-81 County, Alabama

O R



I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_  
(date)

Johnny LUKE  
Signature of Affiant

CERTIFICATE

I hereby certify that the plaintiff herein has the sum of \$ 525 on 3/6/84  
account to his credit at the HELMAN UNIT institution where  
he is confined. I further certify that plaintiff likewise has the following  
securities to his credit according to the records of said institution:

NONE

Shirleyville 3/7/84  
Authorized Officer of Institution

Date March 7, 1984